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No. 01-766

Supreme Court U.S.
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IN THE

Supreme Court of the United States

October Term, 2001

RICKEY BROWNLEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether, in Light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the district court exceeded its sentencing jurisdiction -- and thus committed a reversible, non-waivable error -- by sentencing the defendant to life imprisonment, pursuant to 21 U.S.C. § 841(b)(1)(A), where the indictment charged only a violation of 21 U.S.C. § 841(a)(1) and did not allege the drug quantity necessary to trigger the enhanced penalty provisions of § 841(b)(1)(A)?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES ii
ARGUMENT 1
CONCLUSION 2

TABLE OF AUTHORITIES

Cases

Apprendi v. New Jersey,
530 U.S. 466, 120 S.Ct. 2348,
147 S.Ct. 435 (2000) 1
United States v. Cotton,
261 F.3d 397 (4th Cir. 2001),
cert. granted, 122 S.Ct. 2535 (2002) 1-2

Constitution, Statutes and Rules

U.S. Const., Amend. V 2
21 U.S.C. § 841 1
21 U.S.C. § 846 1

ARGUMENT

The government concedes that Petitioner Brownlee has raised many of the same issues concerning the application of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that are currently before this Court in *United States v. Cotton*, 261 F.3d 397 (4th Cir. 2001), *cert. granted*, 122 S.Ct. 2535 (2002) (to be argued Apr. 15, 2002) (No. 01-687). The government nonetheless argues that the instant "petition need not be held for decision in *Cotton*" but, instead, should be denied. Brief For the United States In Opposition, at p. 5. According to government, the Sentencing Guidelines in Petitioner's case mandated a life sentence, and the district court could achieve a life sentence, or at least its "functional equivalen[ce]" (130 years), by consecutively stacking the maximum sentences on all of Petitioner's counts of conviction. *Id.* at p. 5. The government, however, has underestimated the breadth of the issues before the Court in *Cotton* and their implications for Petitioner herein. Accordingly, this Court should hold this case for decision in *Cotton*.

In *Cotton*, this Court will be required to determine whether drug quantities are essential elements of federal drug statutes, 21 U.S.C. §§ 841(a)(1), 841(b)(1) and 846, the same issue raised by Petitioner herein. If the Court agrees that drug quantities are elements, *Cotton* likewise requires the Court to determine the consequences of the government's failure to present drug quantities to the indicting grand jury. Thus, among the issues before the Court in *Cotton* is whether the government's failure to allege drug quantities is a jurisdictional defect that undermines not only the trial court's ability to sentence but its power to convict the defendant in the first instance. *See United States v. Cotton* No. 01-

Briefs LEXIS 687, at Argument Section I(E) (responding to jurisdicition defect argument in *Cotton*).

If the Court agrees with the defendant's positions in *Cotton*, it is not a foregone conclusion that district courts will necessarily continue to find that the Sentencing Guidelines can be manipulated to produce the same harsh sentences otherwise prohibited by the Grand Jury Clause of the Fifth Amendment. *See* Brief For the United States In Opposition, at p. 6. The cases cited by the government are, not surprisingly, also from circuits that are in conflict with the Fourth Circuit's decision in *Cotton*. *Id.* The proper course of action in this case, therefore, is to hold this case for its decision in *Cotton* and reverse and remand if the Court affirms the Fourth Circuit's decision.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that the Court hold this case for its decision in *United States v. Cotton*, 261 F.3d 397 (4th Cir. 2001), *cert. granted*, 122 S.Ct. 2535 (2002) (to be argued Apr. 15, 2002) (No. 01-687).

Respectfully submitted,

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